New Supreme Court Sharply Circumscribes Public Employee Free Speech Rights

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Instead of determining whether public employee speech occurring during the course of performing ordinary duties unduly disrupts an employer's operations, courts must now painstakingly determine what constitutes an employee's 'ordinary duties' not withstanding written job descriptions.

As widely anticipated, the resignation of Justice Sandra Day O'Connor and the recent appointments of Chief Justice John Roberts and Justice Samuel Alito have produced a new, more conservative Supreme Court that weighs employers' interests markedly more heavily when examining public employees' fundamental constitutional rights.

The accuracy of that expectation is readily apparent from the court's recent split decision in *Garcetti v. Ceballos*, severely restricting the First Amendment rights of public employees to comment on matters of public concern. At issue in *Garcetti* was the distinction between constitutionally protected public employee speech, on one hand, and personal disagreements with the employer that are properly subject to employer restriction and discipline, on the other. Where and how to draw that line divided the court into four camps.

With Justice Alito providing a key swing vote that likely would have gone the other way if O'Connor were still on the bench, a five-to-four majority starkly proclaimed that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate the communications from employer discipline."

A deep ideological split in the new court is revealed by the fact that the decision garnered three dissenting opinions voicing varied but strongly worded concerns over the implications of the court's analysis. Unpersuaded that statutory whistleblower remedies will adequately protect employees who uncover illegality or incompetence in the administration of public agencies, the dissents characterize the majority's decision as an unjustified departure from established precedent, and a blow to important employee and public interests in ensuring the efficient and lawful administration of the government.

Background

Richard Ceballos was employed by the Los Angeles County District Attorney's Office as a deputy district attorney with supervisory authority over other attorneys in the Pomona branch. In February 2000, a defense attorney contacted Ceballos about alleged inaccuracies in a deputy sheriff's affidavit used to obtain a search warrant in a pending criminal matter being prosecuted by the D.A.'s office. Ceballos examined the affidavit and visited the location it described, determining that the affidavit contained "serious misrepresentations." He spoke with the deputy sheriff who had signed the affidavit, but was unsatisfied with his response. Ceballos reported his concerns to two of his supervisors, then prepared a memorandum recommending dismissal of the case. He followed up with a second, consistent but toned-down memorandum after a second conversation with the deputy sheriff.

A meeting later convened between Ceballos, his supervisors, the deputy-sheriff affiant, and other employees of the sheriff's department. The meeting became heated, and one lieutenant from the sheriff's department sharply criticized Ceballos for his handling of the case.

Ceballos was of the professional opinion that he was required to produce his memoranda to the defense attorney as exculpatory evidence.

Notwithstanding Ceballos' concerns about the legitimacy of the prosecution, his supervisor decided to proceed with the case, pending resolution of a defense motion to "traverse," or challenge, the search warrant. Ceballos was of the professional opinion that he was required to produce his memoranda to the defense attorney as exculpatory evidence under the rule articulated by *Brady v. Maryland.*[1] His supervisors required him to redact from the memoranda any of his professional conclusions as priviledged "work product," which he did. He also was told that he would suffer retaliation if he testified that the affidavit contained intentional fabrications.

At the hearing on the motion, Ceballos was called by the defense as a witness. He recounted his observations about the search warrant but he was forbidden to testify regarding his legal opinion as to the validity of the warrant. The court overruled the defense motion regarding the warrant and the prosecution proceeded.

Ceballos' Lawsuit

Ceballos claimed that the events described above were followed by a series of retaliatory actions by his supervisors, including demotion from his supervisory position to a trial deputy position, transfer to another courthouse, and denial of a promotion. He filed an employment grievance but it was denied on grounds that he had not suffered any retaliation. Ceballos then filed suit in federal court under 29 USC Sec. 1983, alleging that the District Attorney's Office had discriminated against him in retaliation for his second memorandum, thereby violating his rights under the First and Fourth Amendments to the U.S. Constitution.

The federal trial court judge granted summary judgment in favor of the District Attorney defendants, reasoning that, because Ceballos had issued his memorandum during the course of the performance of his ordinary duties, his speech was not entitled to First Amendment protection.

Ninth Circuit Finds Speech Protected

The Ninth Circuit Court of Appeals reversed, holding that Ceballos' memorandum constituted protected speech under the First Amendment, citing *Pickering v. Board of Education*[2] and *Connick v. Myers.*[3] The Ninth Circuit determined that Ceballos' memo, because it discussed what he viewed to be governmental misconduct, was "inherently a matter of public concern."

Citing Ninth Circuit precedent holding that a public employee's speech is not deprived of First Amendment protection merely because it is expressed to government

workers or others pursuant to an employment relationship, the Court of Appeals balanced Ceballos' interest in his speech against the employer's interest in responding to it. The Ninth Circuit concluded that Ceballos' First Amendment right to speak as he did was "clearly established" and that, since the employer failed even to suggest that it was disruptive to operation of the D.A.'s office, the employer's actions were not objectively reasonable.

A concurring opinion agreed that the Ninth Circuit's decision was mandated by its own precedent, but argued that the precedent should be revisited and overruled. A majority of the Supreme Court accepted the invitation to review the case and reversed the decision of the Court of Appeals.

Divided High Court Reverses Ninth Circuit

The court majority began its analysis by acknowledging that "public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern."

Without a significant degree of control over employees' words and actions, there would be little chance for the efficient provision of public services.

The majority found that *Pickering* provided a "useful starting point" for its rationale. In *Pickering*, the Supreme Court found that a teacher who wrote a letter to a newspaper critical of the local school board had engaged in speech protected by the First Amendment and that the district was constitutionally prohibited from taking adverse action against the teacher for the expression. The court in *Pickering* stated that the problem is "to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." This has become known as the "*Pickering* balancing test."

In *Pickering*, the court found that it was neither shown nor could it be presumed that the teacher's speech in any way impeded the teacher's performance in the classroom or interfered with the operation of the school district. Accordingly, the court in *Pickering* found that the district's interest in limiting the teacher's ability to contribute to public debate was "not significantly greater" than its interest in limiting such a contribution by any member of the public.

The present court majority reasoned that *Pickering* mandates two inquiries. First, it must be determined "whether the employee spoke as a citizen on a matter of public concern." If the answer is no, said the court, "the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." If the answer is yes, then "the possibility" of a First Amendment claim arises and "the question becomes whether the relevant governmental entity had an adequate justification for treating the employee differently from any other member of the general public."

Exploring the underpinnings for this doctrine, the court cited a plurality opinion in *Connick v. Meyers* for the principle that "the government as an employer has far broader powers than does the government as sovereign," which means that when a citizen enters public employment, he or she "must accept certain limitations on his or her freedom." The court explained:

> Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services….Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.

Nevertheless, noted the court, government employers face First Amendment limits on their abilities to restrict "the liberties employees enjoy in their capacities as private citizens." The court further stated, "So long as employees are speaking as citizens about matters of public concern,

they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively."

Moreover, noted the court, prior case law has observed that not just the interests of the employee, but those of the public are implicated by such speech. The court in *Pickering* observed that teachers are "the members of a community most likely to have informed and definite opinions" about school expenditures and that it is necessary to promote a "vibrant dialog in a democratic society."

However, presaging the current court's narrow interpretation of *Pickering*, the court stated that the First Amendment does not empower public employees "to constitutionalize the employee grievance." Drawing the appropriate line between expression of public employees on matters of public concern and personal disputes with the employer that are properly subject to employer regulation was the task posed in *Garcetti*, as acknowledged not only by the majority, but by the dissents. But, the court was deeply split on where and how to make that distinction.

The First Amendment does not empower public employees 'to constitutionalize the employee grievance.'

The majority introduced its approach to Ceballos' case with two caveats. First, the court said it was not dispositive that Ceballos expressed his views inside his office rather than publicly. "Employees in some cases may receive First Amendment protection for expressions made at work," said the court. Second, the court said the fact that Ceballos' memo concerned the subject matter of his work was non-dispositive because public employees often are best situated to authoritatively comment on matters related to their workplaces.

"The controlling factor in Ceballos' case," announced the court, "is that his expressions were made pursuant to his duties as a calendar deputy." Stating the core of its holding, the court declared:

> That consideration — the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case — distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline. We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.

The court rejected arguments that its holding would infringe on rights public employees hold as private citizens. Ceballos "did not act as a citizen" when he performed his daily professional activities, including writing his memo regarding disposition of a pending case, said the court. Rather, he was acting as a government employee. "The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance," quipped the court.

The court opined that "refusing to recognize First Amendment claims based on government employees' work product does not prevent them from participating in public debate." The majority emphasized that, "the employees retain the prospect of constitutional protection for their contributions to the civic discourse." However, that prospect "does not invest them with a right to perform their jobs however they see fit."

The court then emphasized the importance its case law has placed on an employer's ability to manage its operations. In that vein, the court stated, "Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission." The court found Ceballos' memo "illustrative." "It demanded the attention of his supervisors and led to a heated meeting with employees from the sheriff's department. If Ceballos' superiors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action," said the court.

To hold otherwise, cautioned the majority, "would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business." Such an outcome would be "inconsistent with sound principles of federalism and the separation of powers," according to the majority.

The majority disagreed with the Ninth Circuit that an "anomaly" would be created by requiring employers to "tolerate certain employee speech made publicly but not speech made pursuant to an employee's assigned duties." The majority emphasized that "employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government." Similar considerations would apply to writing a letter to a local newspaper or discussing politics with a coworker, said the court.

In addition, found the court, employers could reduce the "perceived anomaly" by "instituting internal policies and procedures that are receptive to employee criticism. Giving employees an internal forum for their speech will discourage them from concluding that the safest avenue of expression is to state their views in public."

The court dismissed the suggestion that the majority's rule could be abused by employers who develop excessively wide job descriptions for public employees.

The court dismissed suggestions by one dissent that the majority's rule could be abused by employers who develop excessively broad job descriptions for public employees. "The proper inquiry is a practical one," said the court, and "the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes."

The court also cautioned that "we need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."

Finally, the majority offered as justification for its decision that there is in place a "powerful network" of federal and state "whistleblower" laws, as well as other constitutional and professional restrictions that could be invoked by employees who seek to expose wrongdoing in their workplaces.

Dissenting Opinions

Justice John Paul Stevens, writing in dissent, agreed with the majority that a public employer may take corrective action when an employee's speech is "inflammatory or misguided." But, Stevens asked, "what if it is just unwelcome speech because it reveals facts that the supervisor would rather not have anyone discover?" Stevens cited several appeals court decisions in which police officers were disciplined for reporting corruption within police departments and city government.

"The notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment is quite wrong," contended Stevens. Citing *Givhan v. Western Line Consol. School Dist.*,[4] Stevens noted that, in a unanimous decision authored by then Chief Justice William Rehnquist, "we had no difficulty recognizing that the First Amendment applied when…an English teacher raised concerns about the school's racist employment practices to the principal….Our silence as to whether or not her speech was made pursuant to her job duties demonstrates that the point was immaterial." Stevens maintained that it is "senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description."

Moreover, he stated, "it seems perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors."

Turning the court's characterization of Ceballos' memo against the majority itself, Stevens scolded, "While today's novel conclusion to the contrary may not be 'inflammatory,'…it is surely 'misguided.'"

The most impassioned dissent was written by Justice David Souter, joined by Justices Stevens and Ruth Bader Ginsburg. Souter acknowledged the importance of an employer's ability to effectuate its policies and expect competence and honesty from its employees. However, he said:

> I would hold that private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy, and when they do public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection.

Souter's dissent acknowledged the importance of an employer's ability to effectuate its policies and expect competence and honesty from its employees.

Souter identified two extreme poles regarding speech protected by the First Amendment. At one end, open speech by a private citizen on matters of public concern "lies at the heart of expression subject to protection by the First Amendment." At the other end, "a statement by a government employee complaining about nothing beyond treatment under personnel rules raises no greater claim to constitutional protection against retaliatory response than the remarks of a private employee," said Souter, citing *Connick v. Meyers*.

Citing *Pickering*, Souter continued:

> In between these points lies a public employee's speech unwelcome to the government but on a significant public issue. Such an employee speaking as a citizen, that is, with a citizen's interest, is protected from reprisal unless the statements are too damaging to the government's capacity to conduct public business to be justified by any individual or public benefit thought to flow from the statements.

As in Stevens' dissent, Souter cited the *Givhan* case, in which a teacher was found to have been unconstitutionally fired for complaining to a school principal about the racial composition of the school's administrative, cafeteria, and library staffs. "The difference between a case like *Givhan* and this one" said Souter, "is that the subject of Ceballos's speech fell within the scope of his job responsibilities, whereas choosing personnel was not what the teacher was hired to do." The effect of the majority's line-drawing between the two situations, Souter argued, "is that a *Givhan* school teacher is protected when complaining to the principal about hiring policy, but a school personnel officer would not be if he protested that the principal disapproved of hiring minority job applicants."

Souter found this "an odd place to draw a distinction," particularly since the majority's opinion conceded that the same statements made in a public forum might enjoy constitutional protection. Souter found "no justification" for the majority's line "categorically denying *Pickering* protection to any speech uttered" pursuant to official duties.

Underlying the court's decision in *Pickering*, reasoned Souter, "is the recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public." The public's interest in receiving the information is as much at issue as the employee's interest in disseminating it, noted Souter. Expanding on this point, Souter proclaimed:

> This is not a whit less true when an employee's job duties require him to speak about such things: when, for example, a public auditor speaks on his discovery of embezzlement of public funds, when a building inspector makes an obligatory report of an attempt to bribe him, or when a law enforcement officer expressly balks at a superior's order to violate constitutional rights he is sworn to protect.…The majority, however, places all these speakers beyond the reach of First Amendment protection against retaliation.

Souter agreed with the majority that "official communications have official consequences, creating a need for substantive consistency and clarity." So, "up to a point," he said, "the majority makes good points: government needs civility in the workplace, consistency in policy, and honesty and competence in public service." However, he rejected the rigid line drawn by the majority, complaining that it failed to account for "the undoubted value of speech to those, and by those, whose specific public job responsibilities bring them face to face with wrongdoing and incompetence in government, who refuse to avert their eyes and shut their mouths." Moreover, justifying where to draw the line in the *Pickering* analysis "has to account for the need actually to disrupt government if its officials are corrupt or dangerously incompetent."

Souter argued that an adjustment to the *Pickering* analysis would suffice to resolve the instant case. First, he said, "an employee commenting on subjects in the course of duties should not prevail on balance unless he speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it." As examples of speech that should qualify for protection, Souter identified "comment[s] on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety." Applying such a standard would enable trial courts to sift out meritless claims on summary judgment, thereby avoiding the unduly intrusive role feared by the court majority, contended Souter.

Second, under the general *Pickering* approach long accepted in the Ninth Circuit and other courts of appeals, there have been very few claims to constitutional protection for speech made within the workplace, said Souter, citing statistics for the year Ceballos' claim was filed. But, even that low number would be diminished if the high standard he articulated for eligible speech were to be applied, Souter opined.

Moreover, Souter chided the majority, the court's decision invites a flood of litigation over what exactly constitutes an employees' official duties, since, as the majority states, job descriptions are neither "necessary nor sufficient" to determine what an employee officially does.

Souter also criticized the court for misconstruing two lines of case law extraneous to the *Pickering* analysis. The first involves employees who speak officially on behalf of the government and whose speech therefore constitutes speech by the government itself. For example, in *Rust v. Sullivan*,[5] the Supreme Court held that there was no violation of speech rights of federal fund recipients when the government forbade on-the-job abortion counseling because "when the government appropriates funds to promote a particular policy of its own it is entitled to say what it wishes."

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Souter observed that Ceballos was not hired to voice any particular position or policy on behalf of the D.A.'s office. "He was paid to enforce the law by constitutional action: to exercise the county government's prosecutorial power by acting honestly, competently, and constitutionally." Souter continued:

> The only sense in which his position apparently required him to hew to a substantive message was at the relatively abstract point of favoring respect for the law and its evenhanded enforcement, subjects that are not at the level of controversy in this case and were not in *Rust*. Unlike the doctors in *Rust*, Ceballos was not paid to advance one specific policy among those legitimately available, defined by a specific message or limited by a particular message forbidden.

Souter acknowledged that the D.A. would have a legitimate interest in restricting Ceballos' speech if it "undercut effective, lawful prosecution," "created needless tension among law enforcement agencies," or contained "inaccurate statements or false ones made in the course of doing his work." However, those interests are unrelated to the majority's concern that when an employee like Ceballos speaks, he does so as the voice of the government itself, which was not true in this case.

Souter expressed additional concern that "this ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to official duties.'"

Nor, in Souter's opinion, is comfort to be drawn from the continued availability of state and federal whistleblower statutory remedies. Generally, such statutes come into play only when complaints are voiced to third parties outside the workplace, which would not have aided Ceballos. Nor would it have helped the teacher whose complaints to the principal were found constitutionally protected in *Givhan*. "In any event," Souter warned, "the combined variants of statutory whistle-blower definitions and protections add up to a patchwork, not a showing that worries may be remitted to legislatures for relief." Thus, he explained, "individuals doing the same sorts of governmental jobs and saying the same sorts of things addressed to civic concerns will get different protection depending on the local, state, or federal jurisdictions that happened to employ them."

Perhaps the most dispassionate dissent was authored by Justice Stephen Breyer, writing alone. He identified four areas where he believed there was "common ground" among all the justices. First, he asserted that because most human interaction takes place through speech, it cannot all be afforded First Amendment protection. Next, he observed that where government employee speech is at issue, it is due First Amendment protection only where it will not unduly interfere with legitimate governmental interests, such as in efficient administration. "That is because the government, like any employer, must have adequate authority to direct the activities of its employees," he noted. Breyer also proclaimed that where a government employee speaks as an employee upon matters only of personal interest, the First Amendment offers no protection. Finally, Breyer identified agreement that the court's precedent does not define what "screening test" should be used when a government employee speaks regarding a matter of public concern but does so in the course of his ordinary professional duties.

Breyer said that he agreed with much of Souter's analysis but believed that it gave insufficient weight to the managerial and administrative concerns identified by the majority. Breyer continued:

> There are…far too many issues of public concern, even if defined as "matters of unusual importance" for [Souter's] screen to screen out very much. Government administration typically involves matters of public concern. Why else would government be involved? And "public issues," indeed, matters of "unusual importance," are often the daily bread-and-butter concerns for the police, the intelligence agencies, the military, and many whose jobs involve protecting the public's health, safety, and the environment.

Breyer agreed with Souter's analysis but believed it gave insufficient weight to the managerial and administrative concerns identified by the majority.

"Indeed," said Breyer, "this categorization could encompass speech by an employee performing almost any public function, except perhaps setting electricity rates" (an exclusion Californians might dispute).

Breyer also was sympathetic to the majority's consideration of the availability of statutory whistleblower protections, finding that they "diminish the need for a constitutional forum."

However, the majority's conclusion that a public employee may "never" receive constitutional protection when speaking in the course of ordinary duties as an employee is "too absolute," according to Breyer.

Breyer noted that Ceballos' speech "is subject to independent regulation by canons of the profession." As such, Breyer contended, "the government's own interest in forbidding that speech is diminished." In addition, citing

Kyles v. Whitley,[6] Breyer pointed out, "a prosecutor has a constitutional obligation to learn of, to preserve, and to communicate with the defense about exculpatory and impeachment evidence in the government's possession." A prison doctor might have a similar "constitutionally related professional duty" to report to superiors unsafe or unsanitary conditions in a cell block. Other such examples likely exist, he surmised.

"Where professional and special constitutional obligations are both present, the need to protect the employee's speech is augmented," Breyer argued. He would find that the Constitution mandates special protection of employee speech within the *Pickering* balancing test.

Justice Breyer concluded that the First Amendment does protect public employee speech regarding a matter of public concern occurring during the course of the performance of ordinary professional duties, but "only in the presence of augmented need for constitutional protection and diminished risk of undue judicial interference with governmental management of the public's affairs." In Breyer's view, those conditions were met in this case and should have been resolved in Ceballos' favor under the *Pickering* balancing test.

It seems unavoidable that the majority's opinion will chill public employee efforts to correct improprieties in their government workplaces.

What Now?

The court majority remanded the case to the Ninth Circuit for reconsideration in light of the court's decision. However, important questions regarding Ceballos' claim remain unanswered.

Justice Souter encouraged the Ninth Circuit to consider several facts when reviewing the case on remand. Ceballos' lawsuit alleged retaliatory action not just for his second, toned-down memorandum, but for his testimony, for talking with his superiors, testifying truthfully at the hearing, and for a speech he delivered to the Mexican American Bar Association about misconduct of the Sheriff's Department. The Ninth Circuit found that the second memo, alone, was speech entitled to First Amendment protection and did not consider these other bases for Ceballos' claim. "Upon remand," guided Souter, "it will be open to the Court of Appeals to consider the application of *Pickering* to any retaliation shown for other statements; not all of those statements would have been made pursuant to official duties in any obvious sense, and the claim relating to truthful testimony in court must surely be analyzed independently to protect the integrity of the judicial process."

It remains to be seen how the court would handle a situation where a person in Ceballos' circumstances goes directly to the press with allegations of misconduct by his or her employer. The high court majority indicated that such speech would be afforded "some protection." However, it seems equally true that professional canons requiring confidentiality, and perhaps even more pronounced questions regarding interference with the efficient administration of the employer's operation, would come into play under such circumstances.

Varied statutory remedies remain available to public employees, but, as noted by Souter's dissent, have varying requirements and provide uneven degrees of protection. Only in jurisdictions statutorily protecting or requiring employees to report misconduct or incompetence to supervisors would such speech be protected. If left to rely on the First Amendment to the Constitution, public employees now will be forced to run the risk of expressing their concerns regarding matters of public importance in some manner outside their ordinary duties. It seems unavoidable that the majority's decision will chill public employee efforts to correct improprieties in their government workplaces.

Additionally, the high court may have simply substituted the daunting task of determining what constitutes an employee's actual duties, notwithstanding job descriptions,

when determining whether speech is protected for the task of determining, under the *Pickering* test, whether protected speech unduly disrupted employer operations. It is difficult to see how that task will be less burdensome on trial courts.

Some insight should emerge through the Ninth Circuit's analysis on remand and possible additional Supreme Court review after the Ninth Circuit issues its ruling. As Ceballos did not file any statutory whistleblower causes of action, the Ninth Circuit will be required to resolve the remaining questions in his case entirely on constitutional grounds as guided by the Supreme Court's new opinion.

One thing is for certain: this case portends a novel jurisprudential course under the steerage of the newly configured court. Ceballos' case had been orally argued before the court while O'Connor remained on the bench. It was set for re-argument after her resignation, indicating that Alito's vote changed the direction the case was to take. Had O'Connor been involved, Souter's analysis likely would have constituted the opinion of the court.

CPER will track this case on remand and beyond and will report on these critically important issues affecting the balance of employers' and employees' interests as this new era of case law unfolds. (*Garcetti v. Ceballos* [5-30-06] 126 S.Ct. 1951, 2006 DJDAR 6495.) ❋

1 (1963) 373 U.S. 83.
2 (1968) 391 U.S. 563.
3 (1983) 461 U.S. 138, CPER SRS 22.
4 (1979) 439 U.S. 410.
5 (1991) 500 U.S. 173.
6 (1995) 514 U.S. 419.